UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
CV 06-4112 (ADM/JSM)

Fair Isaac Corporation,

Plaintiff,

vs.

Equifax Inc.,
Experian Information Solutions, Inc.,
Trans Union, LLC,
VantageScore Solutions, LLC,
Does 1 through X

Defendants.

Minneapolis, MN

Courtroom 8E

June 25, 2008

REDACTED VERSION

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TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE JANIE S. MAYERON
UNITED STATES DISTRICT COURT MAGISTRATE JUDGE

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Proceedings reported by stenotype, transcript produced by computer-aided transcription.

P R O C E E D I N G S

THE COURT: Thank you. Good morning everyone. I understand you've had the pleasure, some of you, of running into your former contemporary, now Judge Keyes. He came out here, and I'm sure you were all wondering why he was here, to arraign you all. No.

All right. Well, I have to say it's a pleasure having Judge Keyes on the bench. He's been a colleague forever, so we're delighted. Sorry to take him away from you all.

All right.

MR. TIETJEN: That's okay.

THE COURT: Understood. All right. We're here this morning in connection with the matter of Fair Isaac Corporation versus -- well, it starts off with this Equifax et al, but we'll have to pull that name off of the title here. This is Court File No. 06-4112. If the attorneys could identify themselves. Let's start first with Fair Isaac.

MR. TIETJEN: Good morning, Your Honor. Randall Tietjen and Mary Kiedrowski from Robins, Kaplan, Miller & Ciresi for the plaintiffs Fair Isaac.

THE COURT: All right. And on behalf of Trans Union?

MR. GARDNER: Good morning, Your Honor.

James Gardner and Chris Morris.

THE COURT: And on behalf of Experian?

MR. JACOBSON: Good morning, Your Honor. Mark Jacobson and Chris Sullivan from Lindquist & Vennum and Rob Milne from White and Case.

MR. MILNE: Good morning, Your Honor.

THE COURT: Good morning. And on behalf of VantageScore?

MS. MILLER: Good morning, Your Honor. Justi Miller from Kelly and Berens.

THE COURT: Did I miss anyone? This is sad when I know all the parties' names by heart. I don't even need to look at the docket anymore.

We're here this morning to address plaintiff's motion to compel. Then when we're done with that, we'll go into our off the record, and we will go into our monthly case management conference. And I know that we have two disputed issues there that the parties are prepared to resolve on an informal basis at that case management conference.

But having said that, given we do have a court reporter here, let me ask just in terms of the mechanics, does anyone desire to have the court reporter take down the case management conference and in particular the two disputed issues?

MR. TIETJEN: Fair Isaac would like it recorded, Your Honor.

THE COURT: All right. Then I think that answers it. Whether the defendants agree or don't agree, will that work for you, Ms. Court Reporter?

COURT REPORTER: Yes, Your Honor.

THE COURT: All right. Well, we're here to address plaintiff's motion to compel. I have the moving papers. I have defendant's response. I also received the documents for the in camera inspection. I've looked at those documents. I understand there is no reply that was filed, so I'm prepared to hear argument. Mr. Tietjen?

MR. TIETJEN: Thank you, Your Honor. If you've had a chance to review the briefs, because I understand time is limited this morning, I will try and just respond to the defendant's argument in their brief.

This is a motion to compel production of three documents which in the motion papers as you've seen are referred to as Plaintiff's Deposition Exhibits 150, 151, and 160. Exhibits 150 and 151 are related. 150 are minutes from Project Trident meeting that were prepared by a representative of Mercer, the bureau's consultant on Project Trident. The gentleman's name is Piyush Tantia.

These minutes, the defendants contend, contain legal advice and for that reason they clawed them

back during the deposition. Your Honor may recall all of this because the minutes were filed by my client in support of its last motion to compel. And the minutes were on file with the court for nine days right up until a few hours before the defendant's response to our motion was due. And it was on that same day when a colleague of mine who was taking the deposition of Mr. Tantia, and it was during that deposition when we contend that the questioning of Mr. Tantia regarding those minutes made the defendants uncomfortable. They clawed the document back.

The defendants contend that even though they had let the document reside on file with the court for nine days, that doesn't represent a waiver because as they say on page 12 of their motion or their papers, nothing in the record suggests that the defendants were aware of the document any earlier. Well, and they contend later that essentially they were busy and implying that they didn't see it as part of our motion papers.

I have no information and they're correct, no information to counter that. I've never taken a deposition of any of the defendant's counsel to find out whether they read our motion papers or not, but the fact is that they did reside with the court for nine days and nobody objected to that.

But I would like to concentrate more on the

defendant's claim that the redacted information in those minutes represents attorney-client privileged information.

Now the redacted portion of those minutes is essentially a repetition of what the defendants have been calling their meeting guidelines, their antitrust guidelines. XXX XXX XXXXXXX XXXXXXX XXXX.XXXX XXXXXXX XXX XXXXXXXX XX XXXX XXXXX XXXX XXXXX. XXXXXXX XXX XXXXXXXX XX XXXX XXXXX XXXXXXX. XXXXXXX XXX XXXXXXXX XX XXXX XXXXX XXXXXXXXX. XXX XXXX XXXXX XX XXXX, XX XXXX XXXXXXXX XXX XXX XXXXX XXX XX XX X XXXXXXXXX.

The defendants have produced to us several versions of their meeting guidelines, and you'll recall I assume from the last hearing that another version of their meeting guidelines was in dispute then, and the defendants agreed at that hearing to produce it to us.

And you, I think it's fair to say, encouraged the defendants to explain to us why they hadn't produced all of their meeting guidelines because they really can't pick and choose which versions of their meeting guidelines they want to produce and which ones they want to claim are attorney-client privilege. But that's essentially what they're doing here with the meeting minutes.

The minutes are nothing but another form of the meeting guidelines. The defendants contend that they,

and they say this in their brief, that Mr. Tantia's notes reflect legal advice entirely distinct from the meeting guidelines. They don't explain how they are entirely distinct, but if you read the meeting guidelines and then read the redacted portion of the meeting minutes, you'll see that the same admonitions are reflected in both. XXXX XX XXXXX XXXX XXXXX XXXXXXX, XXXXX XXXX XXXXX XXXXXXXXX, XXXXX XXXX XXXXX XXXX XXXXX.

Those sentiments are contained in the meeting guidelines as well. So I don't know how the redacted portion of these minutes are quote entirely distinct from the meeting guidelines.

And they don't say, in any event, the defendants don't say how those meeting minutes reflect legal advice. Mr. Oliai, an employee of Experian, has submitted a declaration in opposition to this motion, and he doesn't say how in his declaration those minutes reflect legal advice. In fact, in the defendant's brief, they just hypothesize how the minutes could in theory reflect legal advice, and this is at the bottom of page 8 in their brief. The defendants say such communications could have included providing the attorneys' interpretation of the guidelines, explaining the interplay of the guidelines and other applicable laws in answering any questions that the Project Trident team might have

had. Those meeting minutes contain none of that information, reflect none of that. This is just a pure hypothetical that the defendants have invented to support their argument the minutes shouldn't be produced.

None of this, Mr. Oliai and no other affiant actually contends that the minutes reflect any of this thing like discussions about the minutes and the interpretations of them. In any event, even if they did, I don't think they could withhold that information as privileged either. They can't pick and choose what part of the guidelines -- this is my point -- which part of the guidelines they want to claim is nonprivileged and what they want to claim is privileged.

These guidelines are important to them because it is their front, so to speak, that they didn't do anything wrong. They had these guidelines. Everybody read them. Everybody followed them. So they used this as a defense to our antitrust claims, but they're being very selective about it. They don't want to face any questions about these guidelines. They don't want to produce all of the versions of the guidelines. And we contend the guidelines are a farce.

Which leads me to the second part of our motion to compel the production of Exhibit 160. Exhibit 160 is a large set of e-mails, and it's only one in

particular that's at issue here. It's from an Experian employee, again Mr. Stan Oliai, to the same Mercer employee, Piyush Tantia, informing Mr. Tantia that XX XXXXXXXX XXXXXX XX XXXXXXXX, XXX XXXX XX XXXXX XXXXX, XXXXXX XX. XXXXXX XX XXXXXX XX XXXXXX XXXX XXX X XXXXXXX XX XXXXXXX XXXXXXX XX XXXX XX XXXXXXXX XXXXX XXXX XXX XXXXXXX XXXXX XX XXXXXXXXXX XXXXX XXX XXXXXXXXX. XXX XXXXXXX XX. XXXXX XXXXXX XX XXXXXX XXX XXXXXXX XXXXXXXXXXXXX. XX. XXXXXXX XXXXXX XXX XXX XXXX XXXX XXXXXXXX XXXXXXX XXXXX XXX XXXXXXXXX. He was not given any legal advice of that nature. XX XXX XXXX XXXXXXXXXXX XXXX XX XXXXXX XX XXXXXXXXX XXXX XX X XXXXX XXX XXXX XXXX XXXX XXXXXX XXXXXXXXXX. And this is what the defendants argue is legal advice.

Now Mr. Engle's declaration says this and only this. I provided legal advice to Mr. Oliai on the draft agenda. As if calling it legal advice, that is XXXXXXXXXXX XXXX XX XXXXXX XX XXXX XX XXX XXXXXX made it legal advice. The defendants claim that this was a legally necessary change. They call it that on page 15 of their memorandum.

And another point in the defendant's memorandum, it is not legal advice. It is simply XX XXXXXXXXXXX XX XXXXXX XX XXXXXX XXXX XX XXXXX XX XXXX XXX XXXXXX XXXXXXX XXXXX XXX XXXXX XX XX. And the defendants

complain in their brief that Fair Isaac should not be quoting from the transcript of the deposition where Mr. Engle's advice is recorded and that that's privileged information. Actually, the fact that that transcript has been left by the defendants untouched. They did not ask anyone to seal it, in our view, represents yet another waiver of any claim that they might have to privilege.

The testimony in the transcript was left as is by the defendants. They have made no attempt to seal it as they have in other depositions when what they contend is privileged communications were recorded by transcript. Instead, they just in their brief complained, and we quoted from it now.

We assert that this is an instance of the crime fraud exception to the privilege as well. And the analysis there is actually quite simple. The defendants don't accept it, but it is simply this, that on paper they XXXXXXXXXX XXXXXXXXXXX XX XXXXX XXX XXXXXXXXX XX XXXXX XXXXXXX XXXXXXXXXX. XXXX XXXXXX XXXX XXXXXXX XXX XXXXXX XXXX XXXXX XXXX XXXX XXXXXXXXX XXXXX XXX XXXXXXX XX XX XXXXX XXXXXXXX XX. XX. XXXXXXX XXXXXX XXX XXX XXXX XXXX XXXXXXXXX XX XXXXXXXXXX XXXXX XXX XXXXXXXXX, XXX XXXXXXX XXXX XXXX XXXXXX XXXX XX XXXXXXXXX XXXX.

The Court can reasonably infer from that a desire to cover up the discussions that antitrust law by

the defendants own position prohibited them from discussing.

With that, Your Honor, if you don't have any questions, I'll rest.

THE COURT: Let me see if I have any questions for you.

So as to -- I have two questions: One is to the extent that you referred verbatim to the language in the deposition with respect to the advice that Mr. Engle gave to Mr. Oliai to change the name, your view is that they're asking that that be struck from the brief. And, obviously, now you've just quoted it here during this hearing as well. Your view is that is an indication of not only should it not be struck; but, number 2, that's indication that they have waived their right to contest even if it was a privileged communication by not taking any steps to seal it, to claw it back. That that amounts to a waiver, is that right?

MR. TIETJEN: Another instance for waiver. Another basis for it.

THE COURT: And my second question has to do with the fact that as I know you are aware, the rules, Rule 37, the Local Rules, the operative pretrial scheduling order requires a meet and confer before any motions be brought. Defendants have said there was no

meet and confer and cited some cases by my colleagues Magistrate Judge Noel, affirmed by Judge Tunheim, and then by Magistrate Judge Erickson that the failure to meet and confer can be fatal to any motion to compel. If you could address that issue, please.

MR. TIETJEN: The exchanges between counsel during the deposition, both on the record and off the record, constitute a meet and confer. And the defendants insisted that these were privileged communications and were not going to produce them. On Exhibit 150, we had further discussions at the last hearing with the Court and an exchange of correspondence on this subject as well. We believe that represents the sufficient meet and confer among the parties. In any event, any further meet and confer, I believe of any other nature would be futile. The defendants are not changing their position on this.

THE COURT: All right. Those are the only two questions that I had for you. Thank you. Who will be arguing on behalf of defendants?

MR. JACOBSON: I will, Your Honor.

THE COURT: Mr. Jacobson.

MR. JACOBSON: Let me start, Your Honor, and I'll tell you I was a bit longwinded the last time around. I'm going to try to make up for that today.

Let me start with Mr. Tietjen's last point.

You conceive there's a small portion of that deposition transcript which unfortunately is in front of Your Honor. You can judge for yourself whether that constitutes a meet and confer. An exchange of correspondence doesn't constitute a meet and confer. A meet and confer under the terms of the rule has to be either face to face or by phone. You don't do it by correspondence.

And, again, Your Honor will, I think, judge for yourself whether what happened at the hearing concerning solely the question of whether Kiedrowski Exhibit 25, that version of the clawed back document that had been filed with the Court should be destroyed or whether you should hold on to it for further proceedings constituted a meet and confer. None of that constituted a meet and confer.

In fact, Your Honor, and part of the point here is that a meet and confer would have been a meet and confer over the propriety of the redactions made from those documents. This motion was filed before Fair Isaac could even receive the redactions.

THE COURT: On the issue of redactions, let me then raise a question that I have and that goes to Exhibit 160. And my question there is as I looked at the unredacted version and looked at the redacted version, it appears to me that the defendants have gone ahead and

redacted basically everything out of Exhibit 160 with the exception of the header e-mail, and so at least that's what I was provided.

So my question is why is everything in Exhibit 160 redacted as opposed to that which apparently defendant's claim constitutes the legal advice of Tantia's counsel?

MR. JACOBSON: Sure. You're right, Your Honor. There is a top section which is the Oliai e-mail which reflects legal advice. And then underneath that, that is a reply to, and it incorporates the e-mail of Oliai. And, in fact, it refers specifically to that e-mail below in the Oliai e-mail that was redacted. What is below is privileged for two reasons. One is --

THE COURT: So just so I'm clear, are you taking the position that everything below -- everything that comes from Tantia to a group of people, everything below that which sets out the full agenda, everything there is a privileged communication?

MR. JACOBSON: Yes.

THE COURT: And the basis for that is what, as opposed to the lines that apparently Jason Engle wanted changed?

MR. JACOBSON: Two bases, Your Honor. First is this is part of the message from Stan Oliai. It

was incorporated into the message by Stan Oliai from Stan Oliai and referred to in that message conveying Jason Engle's legal advice, so it's part of the conveyance of the lawyer's legal advice to the group, so it's privileged for that reason.

It's also privileged because it was -- this e-mail was the document that was shown to Jason Engle for the purpose of obtaining his legal advice. Now I think what may be causing difficulties as you think this through is a concept we talked about actually two hearings ago about a claw back. It is possible under some circumstances that a document that is part of a communication to a lawyer may be privileged as part of that communication. While some other version of the document that's sitting in somebody else's file and was sent to somebody else may not be privileged. And that may very well be the case.

The real question here is whether the e-mail that was incorporated by Stan Oliai by reference into his e-mail to the group transmitting Jason Engle's advice is part of that message and his privilege for that reason, and it is, Your Honor.

THE COURT: Am I correct that the underlying e-mail, the one that generates the response by Stan Oliai back to the group with the advice of Jason

Engle, the original e-mail meaning the one sent on October 31, 2005, at 9:46 a.m., am I correct that that is already an exhibit? I think maybe an earlier Exhibit 152 or something like that that has not been clawed back or redacted?

MR. JACOBSON: To be honest with you, Your Honor, I don't know. And I'm not sure whether any of my colleagues do. I wasn't at that deposition, and I haven't looked at those other exhibits.

THE COURT: All right. Go ahead.

MR. JACOBSON: As long as we're talking about 160, Your Honor, let's talk about that. Fair Isaac, it appears to me, really raises two objections, two arguments. One is they say that our showing is somehow -- that this is legal advice is somehow inadequate because we don't explain the ins and outs of precisely what legal advice was given.

Your Honor, when the issue is whether our legal advice is protected by privilege, we can't file a declaration saying here is precisely the legal advice I gave. That's what we're trying to protect. That's the reason for what Mr. Tietjen calls the hypotheticals. And that's the reason why the declarations aren't more precise than they are. And the case law is clear about this, Your Honor. You're not required to explain the thought process

of the lawyer in formulating legal advice.

Mr. Tietjen says, well, all Jason Engle said is that you couldn't discuss this item or you had to change the name. He didn't say anything about you can't discuss it. Well, the fact is that Mr. Tietjen doesn't know what Jason Engle told Mr. Oliai. And he can speculate as to, oh, this is all a coverup. Oh, they're just changing the name. This is just a whitewash. But, Your Honor, I suppose that is conceivable that that's true. Far more likely that you change the agenda because you want to change the things that are going to be discussed. That's the function of an agenda. You don't want to put something on there that's not accurate because you don't want to describe something as if it's going to be discussed when what you're really going to be discussing is something else. But the fact of the matter, Your Honor, is that all of that is speculation.

And even, Your Honor, even if it were true that all Jason Engle did was say, "those words could get us in legal trouble, let's change them." That's still legal advice, Your Honor. There's no question that that's still legal advice.

Now if it is for the purpose of covering up a crime or perpetrating a fraud, then even though it's legal advice, there may be an exception to the rule that

says it's privileged. That's the crime fraud exception. But that's not because it's not privileged. That's because even though it's privileged, there's a greater societal interest at work here.

Fair Isaac cites one case on the crime fraud exception, Your Honor. But they don't even, they don't really try to make a showing or make an argument on that. And I think to kind of short circuit that, Your Honor, the best place to look is at Judge Lebedoff's opinion in the Triple Five case which we cited to you where Judge Lebedoff was deciding the issue of whether there should be an in camera review of documents where one side argued that the crime fraud exception applied. And here's what he said, Your Honor, and I'll quote. He said there must be, and I quote, "a factual basis adequate to support a good faith belief by a reasonable person that an in camera review may reveal evidence establishing the claim that the exception applies." That's the standard for in camera review.

Now we've given you the documents for in camera review. Judge Lebedoff makes it clear that there's a greater quantum of proof that applies. If you're making the substantive decision as to whether that exception applies. In other words, whether the documents should be produced, not just reviewed in camera. And he doesn't say

what that greater quantum of proof is. He leaves that for further litigation in that case. But he does say that the factual showing. And here's a key, Your Honor, he says the factual showing of a crime fraud exception must relate to a specific cause of action for fraud or a specific cause of action requiring fraud as one of the elements.

This is not a fraud case, Your Honor. And the case that -- the only case that Fair Isaac cites is the In Re Berkeley case. That's a criminal case involving a grand jury investigation, Your Honor. So, clearly, a crime is the issue in that case. This is not a crime fraud case. That is an important but narrow exception to the attorney-client privilege, and you have to do more than just sort of throw that idea out on the table. And you can't combine the argument that a communication even though privileged must be produced under the crime of fraud exception with a notion that somehow because of some vague notion of fraud, the statement isn't privileged to begin with. They're two completely different concepts, Your Honor.

The other issue with respect to 160 is this argument that somehow by failing to claw back the transcript, we failed to claw -- we waived our privilege. Your Honor, we clawed back the underlying document immediately. The notion that a quote of that document in

the transcript isn't included in that claw back is wrong.

Now that transcript is attorney's eyes only. It's not circulating around. It's not like a court filing where you have to act quickly and dramatically to make sure that the public is not seeing it. And we will most certainly ensure that the distribution of that transcript gets cleaned up when we get your ruling on this issue, Your Honor. But the notion that it is a waiver to not have done something further has no basis, and they haven't cited any cases for that. They haven't even made that argument until today.

THE COURT: Am I correct, and I'm just looking at the plaintiff's memorandum was also and submission was also submitted under seal as well under attorney's eyes only, so to that extent it's under restricted filing with the Court.

MR. JACOBSON: That's absolutely true, Your Honor. By the terms of the parties amended protective order to which we've greed, all of those filings have to be under seal. That's part of the protection. We made sure that we accorded these clawback documents.

So that's Exhibit 160, Your Honor.

Exhibit 150, again you get the same argument, well, you didn't explain to us exactly how the legal advice was formed and what the precise legal advice

is. Well, of course, we didn't, Your Honor, for all the reasons that I've already discussed. You just can't lay out the basis for your legal advice and the specifics of your legal advice in a declaration.

And they say that we don't want to face any questions about the guidelines themselves. Well, that's not true. We've produced the guidelines. They're welcome to ask questions about those guidelines. And then they say, well, this is just the guidelines all over again. Well, it's not, Your Honor.

If you compare the meeting guidelines which are contained in Mister -- as Exhibit 2, I believe, to Mr. Tietjen's, I'm sorry, Exhibit 1 to Mr. Tietjen's affidavit, you'll see that they're different in many respects. And, frankly, Your Honor, that's the reason that this is such a big deal. If it was just another iteration of precisely the same thing, I suspect we wouldn't be in here arguing about it.

There are things that in comments, and frankly, Your Honor, you'll see in the in camera version we gave you under legal, the redacted information, there are a bunch of bullet points, then there's a little gap, then there's another bullet point. The bullet points in that top group, you will see, do not precisely track the meeting guidelines. And I invite you to just compare the

two.

The last bullet point doesn't appear anywhere in the meeting guidelines. That's the one they've emphasized, and that's what they care about. And they care about it because it is different from the meeting guidelines.

And I also want to make clear, Your Honor, Fair Isaac's argument is not that production of the meeting guidelines somehow waived any privilege we might have as to this redacted section of Exhibit 150. Their argument is that somehow it shows that the redacted section of Exhibit 150 is not legal advice. Well, it's just not true, Your Honor. The declarations tell you that this records words spoken by a lawyer to the group at this meeting. It's classic legal advice.

I do think it's important, Your Honor, just as a close, I want to make sure, and it sounds as if you have this sort of top of mind, that protecting and clawing back the statements may, the quotations made from these documents be part of any order that you give assuming that you rule that the clawback was proper and that these documents are privileged.

Unless you have questions, Your Honor, I have nothing further.

THE COURT: All right. No, I don't. Thank

you. Anything further, Mr. Tietjen?

MR. TIETJEN: If I could, please. Defense counsel did not refer to the meeting guidelines in any detail. He just continues to maintain that it's entirely distinct from what's reflected in those meeting minutes. But if after the hearing you have a moment to look at Exhibit 1 to my declaration, the meeting guidelines themselves, you'll see in paragraph 2 of the meeting guidelines, it says, "participants will not communicate regarding possible marketing, pricing, or distribution of the model." That's what the meeting minutes reflect.

Paragraph 6 of the meeting guidelines, "written agendas will be prepared for all meetings of participants and submitted to designated legal counsel for review in advance of the meeting." That's what the meeting minutes say.

So the defendant's position is apparently that if an attorney writes it down in meeting guidelines, it's not legal advice. But if an attorney recites this information out loud at a meeting, that is classic legal advice. I say that makes no sense to me. It's the same thing. And as I said before, they cannot claim in one moment that it's legal advice and privileged, and then in the next moment claim that it's not legal advice and not privileged.

On the subject of waiver, just because the transcript of the deposition is attorney's eyes only, just because it was filed under seal, does not save them from the waiver. They have allowed all of outside counsel to have and use that transcript, to quote from it, to cite it to the court. That is waiver of attorney-client privilege. If you want to ensure the attorney-client privilege, you have to do more than what they've done.

They did not make any effort to have the court reporter seal that transcript. They've only noticed it or woken up to this fact in connection with this motion. They're trying to make up for it now and object and say that that should be struck from our brief because they know that to actually do what they're supposed to do now would expose the waiver, many, many days, weeks later ask for the transcript to be sealed.

So just as they didn't act with any speed in connection with Exhibit 25 of Kiedrowski's declaration, they haven't acted with any speed in connection with this either. It is a waiver, Your Honor.

THE COURT: All right. I have nothing further. Anything further, Mr. Jacobson?

MR. JACOBSON: No, Your Honor.

THE COURT: All right. I'm going to issue my ruling here from the bench with respect to this

particular motion. I recognize I still have under advisement the other ones, but this one I am able to address from the bench.

I'm going to be denying plaintiff's motion to compel to this extent, and I will go through it.

First of all, the parties in the past have done a very good job, I think, in terms of having meet and confers and trying to resolve issues. This one I don't feel met the standard that is required for a meet and confer. And so one of the reasons, although certainly not the predominant reason that I'm denying the motion to compel is I do feel that there was not an adequate meet and confer on this issue. You may be right, Mr. Tietjen, at the end of the day. It may not have changed anybody's mind, but that's not what we judge whether there's been a robust meet and confer, and I don't find that there was one here.

That is one of the reasons I'm denying the motion is it fails to comply with the requirements under Rule 37(a)(1), Local Rule 37.1, and also the operative pretrial scheduling order that all require meet and confers before motions for discovery are brought.

The second reason, however, and going more to the substance of the motions is that I find that based upon the affidavits that were submitted to me and my own

in camera review of the documents that the defendants have met their burden in connection with this motion to establish that all three documents contain privileged communications, and that they were appropriate in being called back.

I'm going to, however, with respect to Exhibit 160, I'm going to be modifying what the defendants did there, but, generally, what I want to say is that the defendants have met their burden. They have provided sworn testimony to me regarding the fact that legal advice was given, that what is reflected in these documents is the culmination of that legal advice. I disagree to the extent plaintiffs are suggesting that they need to share what that legal advice is otherwise there would be a further waiver. I'm satisfied that the defendants have met their burden to establish that there were privileged communications being communicated in these documents.

With respect, specifically, to Exhibit 150 and then 151 has to do with the metadata. First of all, I find based upon my in camera review that the bulleted descriptions in Exhibit 150 are not identical, too, and I cannot conclude that they are merely the repeating of the meeting guidelines which have been produced to plaintiffs.

Second of all, by leaving those Exhibit 150 in the court file for a period of nine days, I don't find

that that constitutes a waiver either. The parties entered into a process by which they would address inadvertent disclosures and have the ability to claw back, and I don't have any reason to believe, and your point is well taken.

Obviously, you would like to think that when you serve documents and pleadings on your opposition that they will read all of your submissions, and that including your exhibits, and that they should have known that included in there was a document that they now consider to be privileged.

But I don't have -- that isn't the standard that the parties agreed to in their protective order. You guys gave yourself a little bit more latitude to address documents that might be inadvertently produced, and I can only imagine part of the reason you did this is because of the sheer volume of documents that both sides are producing was to give yourself a little bit of leeway to address documents that may not come to a parties attention as soon as one side would like.

So, I don't find by keeping the Exhibit 150 on file with the Court for a period of nine days, that that constituted a waiver under the law.

With respect to and the same would be true then with Exhibits 151, I do find that that is a

privileged communication.

With respect to Exhibit 160, I went back, and I think I answered my own question, Mr. Jacobson. In the brief submitted by plaintiffs, they talk about how they first questioned Mr. Tantia regarding the October 31, 2005, e-mail. It was part of Exhibit 152 that apparently was a large set of Mr. Tantia's own e-mail communications, and they did question him about the draft meeting agenda which included the language as an item for the business discussion review of technical sales and marketing inputs in the form of documentation. So, apparently, that shows up in a separate exhibit that was produced to plaintiffs.

Obviously, then when he is shown Exhibit 160, that's where the issue of the claw back comes. And I do find that it was appropriate to claw back 160, but only the advice that is reflected in the Exhibit 160 should be redacted, not the entire e-mail. The fact that, as I look at this e-mail, this e-mail goes out for Mr. Tantia to a group of people. It's not to lawyers. At least no one has said it's to lawyers.

Apparently, Mr. Oliai shows it to his lawyer, and his lawyer Mr. Engle gives advice on the one agenda item saying change it basically. And you may redact that piece of it that shows up in Exhibit 160. It's at page 395 of the e-mails, but it's

MOW-FICO-00002007. You may redact the language after the word, "guys" down to "thanks." In other words, leave "guys" in and "thanks" stand. And the rest may be redacted which is the legal advice, apparently, that Mr. Engle was providing to Jason, and Jason was providing to the group. The balance of the e-mail including what it is that Mr. Oliai is responding to I don't find is a privileged communication.

MR. JACOBSON: We'll produce a new version of that, Your Honor.

THE COURT: All right. So to that extent, it needs to be produced in a redacted fashion.

On the issue of waiver, the argument by plaintiff that they've cited it in their brief at page 7, it's been in the transcript. The transcript was never clawed back. Obviously, the defendants have in the past known to claw back that portion of a transcript that involved apparently what they considered to be communications about a privileged document that they were clawing back that came up, I believe, in the last motion.

However, and in some senses, then it is a waiver, but I find that it is inadvertent, and am not going to conclude that therefore what happened is that the defendants waive their right to claw back that document. Clearly, it was their intention. They exercised it

immediately to pull back the document.

Obviously, what should have happened is they also should have addressed the advice that was stated on the record at that time. It didn't happen. And I don't have any reason to believe that it was intentional or that they meant to leave it in in light of the fact they clawed back the document.

So I do find that the waiver was inadvertent, and I'm going to order that that portion of the brief at page 7 that quotes the advice from Mr. Engle be stricken from the brief. And we'll permit defendants to take steps to claw back that portion of the transcript of Mr. Oliai, I believe it's Mr. Oliai, it's either Mr. Tantia or Mr. Oliai, I can't recall, that quotes the language of the advice from Mr. Engle to Mr. Oliai.

So that's my ruling with respect to these documents. I will issue a short order that is consistent here with my ruling from the bench, but you all have the benefit of my reasoning from what I've just stated.

In terms of producing the redacted version of 160, I assume that's something that the defendants can do within a day; is that correct?

MR. JACOBSON: Yes, Your Honor.

THE COURT: As a practical matter, plaintiffs already have what that piece is at least to the

extent it's part of Exhibit 152 in the e-mails. They obviously know what that e-mail looks like.

I have nothing further then as it relates to the motion to compel. Anything further on behalf of plaintiffs on this motion?

MR. TIETJEN: No, Your Honor.

THE COURT: Anything further on behalf of defendants?

MR. JACOBSON: One thing, Your Honor. Maybe I'll come up. In preparing for this argument last night, I went through the plaintiff's brief pretty carefully. There are other places in that brief where although there are not quotation marks, the documents that you've ruled are privileged, are essentially quoted. And maybe the easiest way to do this is for me to talk with Mr. Tietjen afterwards and see if we can resolve it or during a quick break. If not, I can go through them with you.

THE COURT: Mr. Tietjen, is this something you'd be willing to meet with Mr. Jacobson on?

MR. TIETJEN: Sure.

THE COURT: All right. Okay. You know, maybe what we can do is deal with the other issues on an informal basis and take a short break and see if there's an issue here that we need to resolve so that we can get

this issue put to rest.

All right. Then that concludes the motion to compel. At this time, then we'll switch hats and go on to the case management conference.

All right. You all are planning on updating me on the schedule for depositions and document production or update me on what's proceeding. I realize some of this may be tied into the issues with respect to amendment of the pretrial scheduling order and the protective order, but if parties would like to update me first, and then we'll get to the two issues that the parties have asked that I resolve. Who would like to, Mr. Tietjen, do you want to start with the update?

MR. TIETJEN: Sure. With respect to documents, the defendants all produced additional documents, at least I can speak for my client, Fair Isaac, by the June 15th deadline and the Court's pretrial schedule. That was documents, you may recall, actually you recall because it's minutiae. That was documents that were dated after September 15th of last year up to February 15th of this year. We were to produce by June 15th.

THE COURT: Okay. So you're saying you have done that or both sides have done that is your understanding?

MR. TIETJEN: We have done it, and I just assume the defendants can do the same. So the documents have been produced, and we are still thick in the throes of depositions, both sides. And I don't know that I need to lay it all out for you who is going be deposed and when, but we continue taking them. My colleagues are out in California now to take some tomorrow. I was just in Chicago for the last two days as was Ms. Kiedrowski. We are scheduling more into July on a variety of subjects, both party depositions and third-party depositions. We're working, all working with our calendars to find dates, and so it's coming along.

THE COURT: Tell me, I almost cringe at asking this question, but it will also bear on the issue of the pretrial scheduling order. Right now under the current scheduling order, it is contemplated that all fact discovery be completed by July 1 and here we are now at June 25th, six days away from that date.

What depositions does plaintiff or how many depositions, fact depositions does plaintiff have left to complete?

MR. TIETJEN: How many? Several are, a couple are of a 30(b)(6) nature. VantageScore, that was supposed to be Wednesday of last week, I believe. And VantageScore asked for that to be sometime in July. It

was supposed to be today.

We have a 30(b)(6) deposition of Experian yet on some trademark and some damages issues. We have a 30(b)(6) Trans Union.

THE COURT: Is that currently scheduled for before the end of June or in July?

MR. TIETJEN: We are anticipating July, if the Court will accept the parties proposal for a three week extension. It was to be this week as well. And the same of Trans Union, a 30(b)(6) on some trademark issues and damages issues. And then on Monday, next week, we will be taking a deposition, Mr. Paul Springman from Equifax. I guess you would call that now a third party deposition.

THE COURT: Is that one you've noted or defendants have noted?

MR. TIETJEN: Yes, we've noticed it.

THE COURT: Paul Springman from Equifax?

MR. TIETJEN: Yes.

THE COURT: Okay.

MR. TIETJEN: Tomorrow we will be taking the deposition of an Experian employee by the name of Michael Swabb. Carrie Williams of Experian will be deposed on Monday. That's out in California, too.

THE COURT: So Swabb is on Monday as well

and Williams?

MR. TIETJEN: Swabb is tomorrow, and Mr. Williams is on Monday.

THE COURT: Okay.

MR. TIETJEN: And then we propose to take up to five very short maybe one hour third-party depositions of the consumers confused by the credit score. Those have not been noticed up yet.

And then, and I have not noticed up this yet either, but it was just yesterday I took the deposition of an individual employee from Trans Union by the name of Jason Wright who was part of the Project Trident team. He was part of a sub-team responsible for developing their marketing plan. Mr. Wright, it turns out after taking his deposition, seems to suffer from a case of total amnesia and doesn't remember any e-mails he wrote or any meetings that he attended or any minutes that he received or didn't remember a thing. So now I'm going to inform TU that we'll have to take the deposition of one of his colleagues who maybe has a better memory than he does, and it will likely be a woman by the name of Kelly Roth.

So there's a certain fluidity to it. Even at this late date we're learning things, and I think that is a complete list. Is that a complete list, as far as you can recall? That's a complete list of the names of

individuals so far.

THE COURT: I know that the five third party depositions, the ones of consumers are short, probably an hour. Are the rest of them ones that you contemplate will take a full day?

MR. TIETJEN: The 30(b)(6)'s I very likely will. Mr. Springman probably won't. Mr. Swabb, I think those are -- we may be able to do most of the depositions in four or five hours. They're not taking a full seven hours with most of the depositions, so the 30(b)(6)'s are going to be full depositions.

THE COURT: Okay.

MR. TIETJEN: Oh, yeah, there's a 30(b)(6), a 30(b)(6) Equifax, too, that we're going to take, and that was scheduled for Monday. And Equifax's counsel contacted me yesterday, and the other defendants don't know this yet, I don't think, unless they keep in contact with their former co-counsel, and she said that that witness who was going be the designated counsel, her name is Myra Hart, just returned from a trip, and they would ask for her deposition to be a little later so they have more time to prepare her.

THE COURT: So that's another one.

MR. TIETJEN: That's another one.

THE COURT: Okay.

MR. TIETJEN: I think that's it.

THE COURT: So I'm counting you've got eight plus the five consumers. So approximately 13 depositions recognizing they will last different periods of time.

MR. TIETJEN: Yes.

THE COURT: And at this point are the parties double, triple tracking depositions or are you still trying to only be involved as parties in one deposition on a day?

MR. TIETJEN: No, I think we're double tracking. Yesterday, we were taking depositions in our office, and I was --

THE COURT: I'm just curious how you are trying to get all of this done. All right.

MR. TIETJEN: It's not easy. I should say though that this goes to my point that there is a certain fluidity in all of this, and I noted this in our letter to you as well that we do learn a lot in these depositions that and sometimes we don't learn anything and that makes us take another deposition. The 30(b)(6)'s in particular have been from our perspective a problem in that the defendants have not adequately prepared their witnesses on the designated topics.

With each one of these 30(b)(6)

depositions, we need to assess do we take an individual now because they're refusing to put up somebody who can testify on these subjects or do we bring a motion to compel them to properly prepare a witness on these topics. So I guess my point is everything I tell you as I stand here today might be different tomorrow.

THE COURT: I understand. All right. In terms of update on discovery before we get to the two issues, if the parties could share with me where, first, where they are on the document production, and I would like to get a handle from the defendants in terms of what they have left to do by way of depositions.

MR. JACOBSON: We are, Your Honor, in the same boat on in terms of document production. We have finished that June 15th production. And as usual, documents have been flying around in this case, but I think we're on track and good on all of that.

THE COURT: All right.

MR. JACOBSON: In terms of deposition, our schedule is much less jammed than the plaintiffs. I think we've got, although, I have to admit it is somewhat fluid. Both sides have been operating on the assumption that we're going to be extending the schedule here, as you can tell. I think we have probably four or five Fair Isaac employees or former employees scheduled. And it looks

like three or four on our third party depositions, maybe less, and then a couple left to schedule as well.

THE COURT: A couple third party?

MR. JACOBSON: Yes, third party.

THE COURT: So really you have somewhere, ultimately, you would like to accomplish somewhere between five to six; is that what you're saying, total third parties?

MR. JACOBSON: I think that's probably right. And I'm subject to correction if anybody knows better.

THE COURT: Okay.

MR. JACOBSON: And it's also possible depending on what happens in these consumer confusion depositions that Fair Isaac has told us about, that there might be some reaction to that, Your Honor.

THE COURT: What does that mean, "reaction to that?"

MR. JACOBSON: Well, it's conceivable that we have no idea what's going to happen in those depositions, so it's conceivable that we would need to do a deposition or two in response, but we just don't know until we --

THE COURT: Of the same individuals or of different ones?

MR. JACOBSON: No, I don't think of the same individuals. We would do that at the time, I assume, Your Honor.

THE COURT: In other words, that may, depending on how those depositions proceed, you may find that you need to add some depositions on the issue of consumer confusion.

MR. JACOBSON: Correct, Your Honor. And I'm not at all certain that that's going to happen. I'll just leave that open to possibility.

THE COURT: What about the issue then depositions related to the settlement with Equifax?

MR. JACOBSON: There are a number of Equifax depositions scheduled. We will take advantage of those. It's possible that we will have to do another deposition or two.

THE COURT: Okay. So when you listed that you have four to five Fair Isaac employees and maybe four to five third-party depositions, are you including Equifax in the third party or is that a separate one?

MR. JACOBSON: I'm going to let you guys fire away on this.

THE COURT: You can all come up.

MR. MILNE: Your Honor, Robert Milne for Experian. With respect to Equifax depositions, there are

already a number of Equifax depositions that Fair Isaac has noticed. And depending on --

THE COURT: I'm only showing -- Mr. Tietjen listed Equifax 30(b)(6) and Paul Springman is the only Equifax depositions he indicated.

MR. MILNE: Well, as far as I understand, there is Mr. Springman. There is this 30(b)(6) witness. And then I understand there's another witness by the name of Wicklund who had, I actually don't know if it's a man or a woman, had his or her deposition taken as a third party, and there was a stipulation entered that because of the settlement, that the defendant's opportunity to cross-examine would be deferred until a later date. So there is this stump, if you will, of that one Equifax deposition that remains. I believe that's accurate.

MR. TIETJEN: It's Dana Wicklund. It's a gentleman. We completed his deposition. The defendants wanted to continue it, so that they can do their two hour examination at a later date when they had more experienced attorneys present, and we agreed.

MR. MILNE: Well, and it was more than that, Your Honor. The Equifax piece here for us is not just trial preservation. We certainly need to do that because we have no guarantee that these Equifax witnesses will show up at trial.

But, in addition, as the papers you have in front of you get into, we wish to take discovery about the nature of the business agreement that Equifax has entered into with Fair Isaac. And, you know, we sequentially we would like to get the documents at least on a faster track, the agreements themselves, so that we can use those in the Equifax depositions.

And with respect to Fair Isaac, and Mr. Jacobson identified the deposition we've currently got on our plate. We don't know what we may need to do in way of Fair Isaac depositions on the settlement. So, for example --

THE COURT: Well, so you're not sure that the four to five that Mr. Jacobson identified will be individuals to whom you would want to direct questions regarding the settlement. You're saying you may need others?

MR. MILNE: That's correct. For example, the ones that are already on our plate that I believe are what Mr. Jacobson was referring to, these are witnesses that I would suspect do not have a significant knowledge or any knowledge about the settlement.

For example, this Friday, we're taking a former head of scoring, Mr. Tatarro. He left the company, so that he's necessarily not going to be involved in the

settlement issues. So I'm not sure that the current list of Fair Isaac witnesses are going to be the ones we need to cover. These are depositions that we've had pending, and we thought we were going to get done. And, indeed, we may have scheduled to be done before the July first cut off.

For example, one of the obvious witnesses that we would need back is the CEO Mr. Green, whose deposition was taken about a week ago just after the settlement was entered, and the plaintiffs blocked questioning about anything to do with the settlement at his deposition, so we reserved the right to bring him back once the discovery issue is resolved.

So the short of it is that we are not necessarily anticipating with respect to Equifax that there will be more names, but we may have an issue about the timing of the scheduling of these depositions in relation to when we receive documents concerning the settlement. And then with respect to Fair Isaac, there may be one or two additional depositions, depending on what we see in the documents surrounding the settlement.

THE COURT: All right. So now going back to how many witnesses, and I recognize that you don't necessarily have a firm number because of these issues related to the settlement, but so far I've got four to

five Fair Isaac employees or former employees who you're not sure at this point are in a position to address settlement issues if you want to address it with them and were permitted to do so. You've got five to six third-party depositions of which three to four are scheduled. You have to return to the Wicklund Equifax deposition.

MR. MILNE: Correct.

THE COURT: And that's what I've got so far. Were there any others that you know of for certain that you still need to complete?

MR. MILNE: Not that we know of for certain except that I would say Mr. Green, the CEO, is someone we almost certainly would want to have back.

THE COURT: On the issue of settlement?

MR. MILNE: That's correct.

THE COURT: All right. I just wanted to get a flavor for what you all are dealing with. Unless, there's anything more to address on updating me on it, we can now, I think, segue way into the issues with respect to the amendment of the pretrial scheduling order. And I would like to do that first because they're related, and then we can talk about the amendment to the protective order.

So, Mr. Tietjen, if you would like to share with me any more information on the amended pretrial

scheduling order beyond what you've got in your letter.

MR. TIETJEN: Just a couple words. There's not actually much of a difference between us on what we're proposing to the Court. We have agreed on proposing an extension until July 22 on fact discovery. And we've agreed to allow a four-week cushion after that instead of a two-week cushion before plaintiff's expert report would be due.

The only substantive difference between us is whether during this three-week extension of discovery should the Court allow this, we could notice up the plaintiffs, notice up any new party discovery not related to the settlement.

Now, as you just surmised, I'm sure, from all of this discussion about the depositions coming up, we are both sides proposing a lot of discovery depositions, party and nonparty, unrelated to the settlement agreement during that three weeks. What the defendants want to stop is us from taking any other deposition that we haven't identified or noticed up yet. And that is unduly restrictive especially when we do not know what is going to come out of these depositions.

As I mentioned, just yesterday I found that a Trans Union witness who I fully believed would know a lot more than he did could not recall a thing. And now I

have to take another deposition so we can get that information. That's the kind of thing that just comes up by nature in fact discovery, and parties usually always work it out. I expect that we will, too, without needing to come back to the court to get an exception or another amendment to the scheduling order. It leaves the Court micro-managing, as I said in my letter. The parties --

THE COURT: So what your proposal is give us three more weeks for fact discovery, and let the parties use it however they want to use that additional three weeks either to complete scheduled depositions, to note new depositions, but don't hamstring us in terms of how we can use this.

MR. TIETJEN: We're not deposition happy on the plaintiffs side. We've probably taken half of the depositions that the defendants have taken, and they're not full day depositions. We're able to do our questioning in five hours or so. We're not going to be piling on unnecessary depositions. I'm just -- our view is just that it should remain flexible between the parties and how to use that three weeks and what they can get done.

THE COURT: Who will speak, Mr. Jacobson? Did you get the short end of the stick today or what?

MR. JACOBSON: Apparently, although, as you

can see, I get help when I need it.

THE COURT: I can see that. That is good.

MR. JACOBSON: Your Honor, I don't think we're really far apart on this at all. And I have to tell you, Your Honor, I have to apologize in some sense because we're sort of bringing this to you unformed, but this is not a lack of meet and confer. As you can see, we've met and conferred every conceivable way over the weekend and everywhere else. We're just scrambling.

THE COURT: I understand, and I'm fine with that. But it seems to me that even as I took you through what it is that you're talking about, you have some parties that you haven't yet decided whether you need to do it. You won't know whether you'll need to do them.

For example, the consumer depositions, you indicate that plaintiff has indicated that they intend to maybe take up to five consumer depositions. You indicated after you hear what they have to say, you may have to take one or two yourself. Why not -- so Mr. Tietjen is saying look, these things come up. Let's not hamstring the parties as to how they use these remaining three weeks. And it seems to me that you're asking for some flexibility on that as well. So as I hear each side tell me what they want to do during the next three weeks, it seems like you're in agreement that the parties, there should be no

limitation placed on the parties in terms of how they use the three weeks. But if you disagree with that and still think there should be, go ahead and share that with me and tell me why your situation is different than Mr. Tietjen's.

MR. JACOBSON: Here's our only concern, Your Honor. Both sides have rescheduled some depositions given this extra time, depositions that have already been scheduled. And that's fine. Both sides have a couple of depositions that hadn't yet been scheduled but were in the works. That's fine.

We have depositions concerning the settlement agreement, and possibly trial depositions to preserve Equifax testimony that may now become necessary. That's a very limited number, but those are directly out of the settlement agreement.

THE COURT: But you have the possibility that you may need to do a couple of consumers yourself. That you're now foreseeing could come out of the depositions by plaintiff.

MR. JACOBSON: And on both sides, Your Honor, there is the possibility that as a result of things that happen between now and the end of discovery, there will be a need for something new that we don't now know about. We don't have any problem with that either.

Our only concern is we don't want this to be a period where people say, oh, you know, there's a bunch of party discovery we should have done two months ago, and we never did it. We didn't think we had time to do it. Now let's jam it in with everything else. That's really our concern, Your Honor.

And perhaps the way to do this is just to kind of leave it with that understanding, and if it becomes a big problem, we'll do a call with the Court and let you figure it out at the time. Mr. Tietjen is right. We have been -- we work remarkably well actually to try to sort all of this out to put it together.

THE COURT: Okay. Anything further on that issue, Mr. Tietjen? All right.

I am, lucky for you all, I am going to go ahead and grant this extension. Otherwise, you would be truly miserable between now and July 1. I've been there, so I don't like to -- I will draw on my experience when I think it is helpful to the parties.

So I will go ahead and grant the extension allowing the parties to have an additional three weeks. And actually what I'm going to look at is the dates that are in Exhibit 7 of the attachments that were sent to me by White and Case. Looking at modifying the deadlines so the fact discovery will change to July 22, and I'll push

back the expert reports consistent with what is in the stipulation here.

I am not going to put a restriction on how the parties use those additional three weeks. I'm going to trust that was both sides will have good reasons for what they do in terms of perhaps finding a need to add another deponent that hey didn't previously add, and I'm also confident that if you think one side has overstepped their bounds, it's too burdensome, you can always come back to me to resolve that issue for you.

But I think both sides need some fluidity here and really just cannot anticipate what will come out in the last, basically, what we have here is less than a month for you all to complete fact discovery. So I'm not going to put restriction on how you use that time in terms of depositions.

Obviously, you've got your own restrictions in terms of the number of depositions, hours of depositions, and that actually acts as a constraint as well. You know the good news is you decided, you hoped that I would adopt what you are proposing and began to move off some of the dates in anticipation that I would agree with you. That's the good news.

The bad news is I agreed with you, and you've now pushed those dates off. And it appears to me

you have created just a miserable life for yourselves in the last month, but that always is what happens. It always ends up in the last two minutes of the game, so I just, you know, I understand that's the way it works.

So I will be putting into place a scheduling order, a fourth amended scheduling order, changing these dates. Now I don't know if there are in the stipulation whether I look at Exhibit 6 which I think is the last one that was sent by Mr. Tietjen's office to defendants and then defendants took most of that stipulation and adopted it except made a couple changes here and there.

I don't know if there are other issues that you want to make sure that I include in the scheduling order or in the amended scheduling order that are part of your stipulation or not, but my goal will be to amend the scheduling order.

So the question is whether there are items in the stipulation you want to make sure that are showing up in the amended scheduling order for all to see that are covered by your stipulation.

MR. TIETJEN: The only thing I just noticed is that although this table at the end of the stipulation --

THE COURT: Are you looking at Exhibit --

MR. TIETJEN: Either Exhibit 7 or.

THE COURT: I'm looking at Exhibit 7 because there's where Mister -- I don't know if it was Jacobson or who changed the dates on the rebuttal expert and completion of expert discovery moving it back a day.

MR. TIETJEN: Right. And those changes are okay because I think he was just saying that that is going to be 30 days in between there, on November 19th instead of November 20th. But the table doesn't include the plaintiffs.

THE COURT: No, I see it up in the body of -- it's in paragraph 1.

MR. TIETJEN: Yeah, that's part of the comparative, yes.

THE COURT: And that will just show up as a change in the fact discovery date. The question that I have is whether I need to include, for example, in the scheduling order, for example, paragraph what is now numbered -- was paragraph 2 in plaintiff's version and paragraph 3 of defendant's version, about the date by which plaintiff's response to the document requests that were served on the 17th, whether you want that included in the fourth amended scheduling order.

MR. JACOBSON: Your Honor, the answer from our point of view is, yes, and there are really two issues

there. One is we want to get all of those documents as quickly as possible, obviously, and if you -- if we went with the 30 day period, it just puts us too close to the end.

THE COURT: It appears that plaintiffs have agreed to this.

MR. TIETJEN: Yes.

THE COURT: So if you want me to put it in.

MR. TIETJEN: It doesn't matter to us. I mean the requests are subject to our objections, and we're going to be working out what or trying to at least what documents we've produced, but it doesn't matter to us whether it's a scheduling order. It's just an agreement between the parties.

MR. JACOBSON: The other issue, Your Honor, is the settlement agreement itself. We want to get that in hand as quickly as possible because as we said we want to take depositions concerning the terms of the settlement, and we can't do that until we know the terms of the settlement. So that one, I mean I assume that's a discreet document or a discreet set of documents. That we want to get resolved as quickly as possible. And we had talked about it with Mr. Tietjen about getting that produced within a week, but I'm not sure where we are on that at the moment.

MR. TIETJEN: Well, one of the factors of where we are on that leads to our next subject for the case management conference, that is our desire for a protective order regarding document production of that nature.

MR. JACOBSON: Maybe we circle around.

THE COURT: All right. Well, why don't we circle back to that issue, but it seems to me that we need to get this issue of the settlement agreement. We need to find out whether it's getting produced or not. If it's not going to be voluntarily produced then teed up immediately for a motion so that that issue can get resolved, if we need to go that route, or whether it can be resolved informally.

But why don't we then go to the next issue which has to do with the scope of the protective order whether it needs further amendment and then we'll loop back to the issue of the settlement agreement.

MR. TIETJEN: Sure. We've told the defendants that subject to our desire for a protective order, we will produce the settlement related agreements.

THE COURT: Right. As I understand it, what you are proposing is you want to limit who can see it.

MR. TIETJEN: Yes.

THE COURT: All right. And the defendants are saying you can't limit it. It goes to the merits of the matter, and our litigation attorneys who are addressing the merits need to be also able to talk with their client about the possibility of settlement, and they can't ethically do it on a variety of other reasons. They can't do that if they're hamstringed from seeing the settlement agreement.

And you're saying, as I understand it, Fair Isaacs, but if we're going to end up in settlement discussions, we don't want those attorneys to see how we settle with Equifax because that would affect our ability to get the best settlement we could. Is that the essence of this?

MR. TIETJEN: Yes. And this is very competitive and sensitive information. Royalty rates and the amount of the settlement and the terms of it, it's very competitive and sensitive. And all we are asking is that the outside counsel who are allowed to see that then not be part of the negotiations for the settlement, any settlement between their own clients and Fair Isaac.

THE COURT: And let me just ask this. You know, I certainly can understand the issues raised by both sides and the concerns, but let me just ask some general questions. Is the settlement agreement between Equifax

and Fair Isaacs currently, is there an agreement that is confidential?

MR. TIETJEN: Yes.

THE COURT: All right. So, in other words, it can't be shared with the world?

MR. TIETJEN: No. In fact, I think there's also the standard provisions that we need to get permission from Equifax.

THE COURT: All right. And so have you already explored, is there a carve out that it could be shown to the defendants in this case or is this something that you would have to go to Equifax and ask them if they would agree to permit the settlement agreement or other discovery related to the settlement agreement to be disclosed to the defendants in this case?

MR. TIETJEN: There isn't a carve out that I know of in any of the agreements themselves, but I've started that discussion with the Equifax counsel.

THE COURT: Do you have a sense of -- have they said yes, no? Have they given you any read on what their position yet is going to be as far as releasing this information?

MR. TIETJEN: My sense is they know that the settlement related agreements themselves will be produced. We don't have -- I can't say I have an explicit

agreement to that effect yet, but the defendants are asking for a lot more documents beyond that. And I have no sense that how --

THE COURT: How that's going to play out. All right. So the point is, at least as you sit here today, Equifax hasn't said no yet to the request that the defendants are making which is that we want to see the settlement agreement?

MR. TIETJEN: No, they haven't said that, no.

THE COURT: All right. And as I understand what the defendants are arguing is that the settlement agreement bears on their defenses to your clients antitrust claim that it's relevant to it. So would you agree that it has some relevancy to the merits of the antitrust claims or defenses to the claims?

MR. TIETJEN: No. But we're not contesting the discoverability of the settlement-related agreements themselves. I note that in the defendant's letter they want to -- they also wanted to turn the case management conference into yet another motion for summary judgment. They think this takes care of the case. It doesn't in any respect.

THE COURT: I understand that. I will take judicial notice that you violently disagree.

MR. TIETJEN: Well, violently is a little strong.

THE COURT: You disagree.

MR. TIETJEN: Yeah.

THE COURT: All right. So you're not contesting the production of it based on the discoverability, meaning that it could lead to the discovery of admissible evidence. You're not agreeing that it is going to be ultimately relevant at trial?

MR. TIETJEN: Right.

THE COURT: All right. So if you can then address their concern which is how is it then, if their view is it's relevant to the defenses on the anti-trust claim, that as lawyers they have an obligation to talk settlement with their client who evaluate the pros and cons of a case with their clients. How is it then that the lawyers who are involved in the litigation who need this for litigation purposes cannot or how can they be precluded from discussing at some level the terms of the settlement with their clients so that they can evaluate the strengths, weaknesses of their case, decide whether to go forward or not, decide whether to engage in Fair Isaacs -- a discussion with Fair Isaac on settlement?

MR. TIETJEN: Well, as I sat here, I thought what might be a compromise that would satisfy the

defendants and satisfy my own client's concerns -- I can't speak for Equifax -- there are in these agreements some highly sensitive, competitively sensitive information like, for example, new royalty rates between Fair Isaac and Equifax.

Perhaps a solution here is for Fair Isaac to redact from the agreements what it considers this highly competitively sensitive information and that shouldn't have any relevance to what the defendants need those agreements for as they contend.

And that might be a way of giving them the documents. They can take the deposition, but they don't need, for example, to see what the royalty rate is. And that should satisfy, I would hope, everyone's concern. As I said, I thought of it just this morning. And I haven't had a chance to run it by the defendants yet, but maybe that's a solution here that Fair Isaac doesn't have to be too concerned then that it's new royalty rates are somehow even inadvertently in some other way transmitted to the other bureaus.

THE COURT: Are there other items as you think about, have you seen the settlement agreement?

MR. TIETJEN: I have seen parts, the parts that I was involved in, and parts that I wasn't involved in.

THE COURT: So are you able as you stand here today to know if in fact you were to do what you're suggesting which is produce the agreement subject to some redactions of information that your client considers to be highly competitively sensitive and don't bear on the claims or defenses, do you have an idea other than royalty rates what else you're talking about redacting?

MR. TIETJEN: I can't give you an exhaustive list as I stand here. I would have to talk to my client about it. But royalty rates is one that immediately springs to mind. The amount of any settlement money involved is another one, but I could confer with my client about that and --

THE COURT: I was just curious to get an idea. All right.

Why don't I hear then from whoever will speak on behalf of defendants. Mr. Gardner?

MR. GARDNER: I'm giving Mr. Jacobson a break. You know we had this argument once before right here in this courtroom with respect to the algorithm. And the issue was could we restrict algorithm-related documents so that outside counsel couldn't see it, and Your Honor ruled that no outside counsel could see it. The problem I'm having is I really don't see how it's at all workable.

I am the principle lawyer for Trans Union. The information in the settlement agreement is obviously critical to our case. It establishes access to data and distribution. If and when we get to any settlement discussions, I will be the one to have to advise my client on whether they should settle. As Your Honor is well aware, we have attorney's eyes only provisions in this case which have been honored. So if I saw the terms of the settlement agreement, I am precluded from telling my client what those terms are. So we believe that the existing attorney's eyes only prohibition or protection is sufficient in this case.

With respect to Mr. Tietjen's suggestion, very difficult now to say, well, we're going to give them carte blanch to redact certain portions of the agreement. Royalty rates may become relevant in some respect depending on what they are. If it's a very high royalty rate or a very low royalty rate, that may have some bearing on our defenses. So I think at this point we can't be hamstrung to say, well, they get the right, the unfettered right to just redact anything they want.

I, and this is true for all of this in this room, those of us that are litigation counsel need to see the documents for purposes of trial preparation. We are all precluded from discussing what we see with our

clients, and that should be enough.

THE COURT: So let me put then the kind of the Hobson's choice to you here. If you're precluded from discussing what you see in the settlement agreements with your clients because they're going to mark them attorney's eyes only, then why do you need to see them?

In other words, if a tree falls in the woods and no one is there to hear it, who cares? So you have this information, but as litigation counsel what you're telling me is you will be hamstrung. You can't share that information with your client in order to allow them to take that information into account as to what to do with the case whether to settle, how much to settle it for. So why do you then -- I can understand why you may need it as litigation counsel to pursue the merits of your claim, but given you can't disclose what is in there for presumably the terms for settlement purposes, why is not Mr. Tietjen's original suggestion make sense?

MR. GARDNER: The reason is is we can't be precluded from or we shouldn't be precluded ethically from discussing a settlement with our client. And the settlement discussion may have nothing to do and probably won't with whatever the Equifax deal is. But he, in his suggestion, has a cart blanche statement that we, all of us in this room who are the litigation counsel, if time

comes to discuss a settlement with our clients, we're precluded from that discussion. That's too Draconian.

I have to be in a, we clearly need this for litigation as Your Honor has suggested. It's a critical piece of evidence for the defendants. So let's put that aside.

Now it certainly not right or fair that all of us as litigation counsel now can't discuss settlement with our client. Chances are whatever deal Equifax and Fair Isaac struck is not something that's going to be that critical to whether or not our clients decide to settle. As I think the parties have recognized from the get-go, to a large extent, this case involves business transactions. Equifax and Fair Isaac have agreed to a business transaction. It may well be that Trans Union and Fair Isaac or Experian may agree to a business transaction. That transaction will stand on its own in terms of whether or not it is right for those two parties without regard to whatever the Equifax deal is. So our concern is we can't be precluded. It isn't in my view a Hobson's choice. We can't be precluded from at least discussing settlement with our clients. Do you want to add?

MR. MILNE: Just add a concept here, what, as I think about this, what role clearly the outside counsel's only designation limits us in our ability to

share specifics or even generalities about the materials so designated with our clients. When it comes to settlement, the kinds of discussions that I would imagine will occur will be which is what happens with litigation counsel all the time.

You've got a deal on the table. And the client is looking to litigation counsel to say okay, how should I -- there's this deal. And what are my litigation chances? You know, what is the prospect? How do you place the risk of going to trial, the expense of going to trial, those types of things? Factoring in necessarily to that litigation assessment will be the relevant evidence that we've seen. Not that we would be providing the detail of it, not at all. We can't do that under the existing provisions, but we will give our overall impression. Yeah, we think it's worth -- it's going to cost you X amount of money to try this case. We think your chances of winning are whatever they are. You do that cost benefit type analysis all the time in litigation.

This proposal prevents the lawyers, the only lawyers who are really capable of doing that type of risk benefit analysis subject to the protective order, precludes them from having any role whatsoever in advising the client on settlement. And so that's why for Experian,

we, you know, we take the position that we do here. And we think the outside counsel eyes only can work and will work.

THE COURT: Anyone further?

MR. JACOBSON: Your Honor, let me just say that's also why every pretrial order you issue says that trial counsel shall show up at the settlement conference because you have to be there.

THE COURT: Mr. Tietjen?

MR. TIETJEN: Just a couple of points. Mr. Gardener is wrong. This is not like the algorithm. With the algorithm, the defendants did not want any outside counsel to ever be able to see any of the algorithm-related documents.

What we are proposing is option A is that those outside counsel who have access to all of the terms of the settlement agreement by Equifax then not be the same counsel who are participating in any settlement strategy with Fair Isaac. Their settlement negotiations. That's different.

And, too, on option B that I've just proposed, I have not heard much of an explanation at all why they could not live with a redaction of certain competitively sensitive information like royalty rates. Why do they need to know what royalty rate was struck

between Equifax and Fair Isaac or what the settlement amount is? It doesn't relate to what they contend they want to use the rates for. So I think either option works.

THE COURT: All right. Here's what I'm going do on this issue. First of all, to the extent that plaintiff is asking that litigation counsel who would review the settlement agreement or settlement related documents not be permitted to be involved in settlement negotiations on behalf of their client, I'm going to deny that request.

You know, the starting place of this, and that's why I was asking you, Mr. Tietjen, the starting place is is this settlement agreement, is this, and we don't know what the settlement related documents are yet because, obviously, you're still in conversation with them about the breadth of what they want by way of settlement related documents. But it appears that Fair Isaac has taken the position the information is discoverable. That it could lead to the discovery of admissible evidence at trial bearing on the antitrust claims or the defenses related to those claims. So clearly litigation counsel has to be able to see these documents in order to address the merits of their claims.

It is simply not workable, number 1,

reasonable, and I don't think ethical then to say to that counsel to then to deprive their clients of their counsel's advice with respect to settlement because they have in fact seen these documents. So I'm not going to require that to the extent litigation counsel, outside counsel, sees these documents. I'm not going to say to prohibit them from being involved in settlement discussions with Fair Isaac. In fact, they can be.

Having said that, I think that we can do this one step at a time. I'm going to require, for example, that the settlement agreement be produced. I will permit you to redact on behalf of your clients those particular terms that you feel are competitively sensitive. I'm going to assume the whole thing is competitively sensitive. It really goes to the issue of whether these terms that you want to redact have no bearing, are not relevant, could not lead to the discovery of admissible evidence.

So, for example, you claim that you can't imagine why the royalty would have any bearing on your antitrust claim or the settlement amount. I have no idea. And I don't know what else it is that you want to redact. And I don't think the issue is teed up by the parties. It can't be until you make the attempt at redaction. So I'm going to permit you to redact.

What terms you believe rise to that level of being so competitively sensitive and are not discoverable because they cannot lead to the discovery of admissible evidence at trial. And then I'll allow the defendants to take a look at it and see what it is you're redacting, and if you agree, great. If you disagree, then you'll bring it back to me either informally or formally, and we can do it on an expedited basis, so we can get to the bottom of this issue as to whether they should be entitled to it.

I have to tell you though I understand why Fair Isaac doesn't want other parties with whom it may enter into settlement discussions to know about their settlement because it may impact how good of settlement they may get with those other parties. But at the end of the day, Fair Isaacs gets to say I'll settle with you or I won't. No one is forcing Fair Isaac to enter into a settlement that they don't want to enter into. So if the defendants propose a settlement, for example, if in fact they learn all of the terms of the Fair Isaac-Equifax settlement, and the defendants came back and say that should be the ceiling. We should never have to pay any more than that or agree to a royalty rate, Fair Isaacs gets to say no to that. No one is going to force them to take a settlement that they don't want to do.

So I want to caution Fair Isaac about the balancing that they're asking this Court to try and protect. I certainly understand why and I'm willing to do -- willing to listen to that underlying purpose, but at the end of the day, if royalty rates or the term of the settlement in fact can lead to the discovery of admissible evidence, I will let you know I'm going to permit them to see those terms, and then they will be bound by the obligation of the highly confidential outside attorney's eyes only restriction that will not allow them to disclose those terms to their clients, in any event. Just as happened in other documents. So I am willing to do this one step at a time. So I'm giving you the opportunity to redact if you want, and give the defendants an opportunity to look at it. And if you can't agree, then bring it back to me, and you'll have to tee up for me the issue of why our royalty terms or settlement terms are in fact relevant or could lead to the discovery of admissible evidence at trial.

Yes, Mr. Milne?

MR. MILNE: I just wondered if I could ask a question about how this procedure will work, Your Honor. Because, you know, we are concerned about we've given ourselves only three weeks here to deal with whatever remaining discovery there is to be done. And speaking for

the defendants, of course, as you know it's been a drum beat for us for a long time. We want to try to move this case forward and keep the extensions to a minimum.

The issue that concerns me here is we seem to be setting up a whole nother round of dispute. When we're talking about the royalty rate, and we're talking about the amount of any financial compensation that may have gone run, for example, from Fair Isaac to Equifax, I can tell you right now that the defendant's position is that is highly relevant, because and here's very briefly the reason why.

THE COURT: But I'm not going to decide that issue today. And in all fairness, I'm going to give them in a sense putting Mr. Tietjen on notice. I understand the issue you're raising on behalf of your client, and I understand they don't want to share the entire terms, but I'm hoping you'll go back to your clients and remind them that if you do, it's under an attorney's eyes only restriction. The defendants are not permitted to disclose the terms of the settlement to their clients. That's the whole point of this. And notwithstanding are they still going to take the position that it is not relevant, could not lead to the discovery of admissible evidence, such that they're going to say redacted.

And then I expect we can do this on a very short time frame. But I think that the parties need to have that dialogue with each other about you say it's relevant and Mr. Tietjen is saying he can't imagine why it is. I think both sides are entitled to have an opportunity to examine that issue.

MR. MILNE: Your Honor, may I just request that we have a procedure set up where perhaps we do briefing like we did on this particular issue in the form of letter briefs or, you know, short briefs such that we can tee it up for a very expedited hearing or consideration by you because again if we go on the normal schedule, we're already beyond the three weeks before we even get it before you.

THE COURT: I agree. Let me ask you, Mr. Tietjen, how soon can you produce to them the settlement agreement, and if we're going to redact any piece of it with the redactions? Because that to me is the initial issue. It may be that after what has occurred here today, well, a number of things may happen. Equifax may say no, and then we're going to be in some sort of expedited motion before me because they're a party to this agreement.

Number 2, Equifax may say yes, and may say both Equifax and Fair Isaac may say produce it. We're not

redacting, and that will end the issue. How soon can I hear back and the defendants hear back? Today is Wednesday, the 25th.

MR. TIETJEN: Today is Wednesday. I know that the in-house counsel I generally deal with is out of town until Monday but then I know that I myself am in Atlanta taking a deposition on Monday. So, and then there's July 4th. So.

THE COURT: July 4th is Friday.

MR. TIETJEN: Friday of next week is July 4th.

THE COURT: Yes, it's a week from this Friday.

MR. TIETJEN: So by that following Monday I hope to be able to produce then redacted copies of the agreements to the defendant.

THE COURT: Given that the parties have then that Monday would be the 7th, that leaves the parties basically less than approximately two weeks for me to resolve the issue. And however it gets resolved, I'm willing to guess what's going to happen is that depositions that bear on settlement is going to get held off until this issue gets resolved. So I think that we need to be on a faster time line. I recognize the person you talked to, in-house counsel, is gone. I'm hoping that

you're able to reach that person before Monday or someone else can reach that person on Monday.

MR. TIETJEN: Oh, sure, I can reach her. I was just hoping to have a chance to sit down with her with the documents and rather than having a telephone call and she doesn't have them in front of her. Then I'll get someone else in my office while I'm going to work on it with her so then sometime next week we'll try.

THE COURT: Here's what I'm going, and this isn't going be pretty, but I'm going to require that the settlement agreement in whether redacted or unredacted be produced to the defendants by July 1, Tuesday July 1.

MR. TIETJEN: Tuesday of next week?

THE COURT: Of next week. To the extent that it is your redacting, that in a letter to the defendants with the settlement agreement, you indicate what it is that you are redacting and the basis for the redaction.

In other words, you know what their argument is. It's not relevant to any of their claims or defenses. That they don't need to see whatever it is you are going to redact on the merits of the case. And then I'm going to require the defendants to respond to that by the third.

MR. MILNE: We're happy to do so.

THE COURT: All right. And then I think what I'm going to suggest is that the letter to the defendants, if you're redacting, Mr. Tietjen, be copied to me, so it be a letter for the benefit of the defendants and the Court, and that the defendants respond in writing to Mr. Tietjen by the third, copy to the Court addressing why it is that you think they're wrong.

And we're going to take a short break, and I'll see what my schedule is then to either do this over the phone with the parties or in person. Hopefully, that Monday the 7th, Tuesday the 8th, something like that, so that we can get this issue resolved.

MR. TIETJEN: Just so I'm clear, my letter to defendants with the production and copy to the Court, you want me to identify what has been redacted?

THE COURT: Correct. In other words, we redact the royalty term. We redacted the settlement. And then either the policy basis, legal basis, whatever you're going to provide to them and to me as to why it is that that information should be and remain redacted.

MR. TIETJEN: Okay.

MR. GARDNER: May I make just a clarification point?

THE COURT: Yes.

MR. GARDNER: I think we're all on the same

page. It's our understanding based on what we were allowed to inquire, there is a settlement agreement which I'm told is probably very short. But the basic terms are in another agreement which I don't know what it's called, some form of business agreement. So I think we have to be clear. And I think Mr. Tietjen contemplated that is that when we talk about what he has to produce, it's not just quote/unquote settlement agreement, it is the settlement agreement and whatever business terms were involved as part of this settlement.

MR. TIETJEN: No, we're thinking the same thing.

THE COURT: We'll call it the settlement agreement and business agreement.

MR. GARDNER: Right.

THE COURT: All right. Why don't we take -- unless Mr. Milne, you have something further. Let's take a short recess while I go see what my calendar looks like the week of July 7, earlier rather than later.

In the meantime, if you all want to chat about what it is that you would like to think should be redacted from the plaintiff's brief, you could do that while I'm gone. I'll be right back.

(Recess.)

THE COURT: Just to put this piece on the

record, the parties did agree on what items should be excised from the plaintiff's memorandum as it related to my ruling on privileged communications, and I will insert that in the way in the order that won't go ahead and reveal what it is I excised, so I'll figure that out. And Mr. Jacobson handed me the brief with those excised -- portions to be excised.

The entire day is open on July 7th, so we can do this over the phone. We can do it in person, however the parties want to proceed. We can set it at a time, and you can let me know what you would like me to do. Perhaps it won't be necessary but, in any event, what works for the parties?

MR. TIETJEN: I think the option of telephone if necessary given I don't know where I'll be.

THE COURT: Would that work for people? If we set it for say 10 a.m., does that work or if you are going to be in depositions, do you want to set it at a time when you think you'd be breaking, like noon? You know, it doesn't matter to me.

MR. TIETJEN: Noon is fine with me.

MR. MILNE: Noon is fine. I think also if people do decide to fly in, it will allow them to take an early flight to get in that day instead of having to --

THE COURT: All right. Well, why don't I

set it for 12 o'clock then. And I'm going to assume -- well, I won't assume anything. I'm going to set it for 12 o'clock. I'll get a courtroom for that day, July 7th, and then the parties can let me know whether they would prefer to handle this by phone as we do the other conferences, and I'd be happy to address it by phone.

Okay. Then 12 o'clock noon on July 7, central standard time.

Anything further with respect to case management issues? Mr. Tietjen is shaking his head no and defendants are as well.

All right. That concludes this proceeding. Thank you very much.

Oh, let me ask one question on the issue, I am obviously going to be issuing an amended scheduling order. Do the parties want me to put in an order what I've ordered thus far with respect to the settlement agreement which is this process for production and redaction by a certain date or do you not need that in an order?

MR. TIETJEN: I don't need it.

MR. JACOBSON: I think it's helpful, Your Honor, if it's in there.

THE COURT: Pardon?

MR. JACOBSON: We think it's helpful if

it's in there.

THE COURT: I'll put this piece in an order then on the settlement agreement plus the business agreement. All right. Thank you very much.

(End of proceedings.)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: July 2, 2008

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Court Reporter